

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1031

LEONARD TONASKET, APPELLANT

v.

THE STATE OF WASHINGTON ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

This memorandum is submitted in response to the Court's order of April 3, 1972, inviting the Solicitor General to express the views of the United States in this case.

The facts of the case are undisputed. Appellant is a Colville Indian of full blood, who owns a store on allotted land held in trust by the United States in the Colville Indian Reservation in the State of Washington. His customers are Indian and non-Indian, but the majority are non-Indian. In ap-

parent violation of state law, appellant did not obtain a license as a retailer of cigarettes nor affix state cigarette stamps to cigarettes he sold. In February 1967, agents of the State of Washington entered appellant's store, seized the cigarettes he had in stock and arrested him for violation of the state cigarette licensing and tax laws.[1] J.S. App. A, p. 1. Thereafter, appellant brought this suit for a declaratory judgment to establish his right to do business free of regulation or taxation by the State. The Supreme Court of the State of Washington, affirming the judgment of the trial court, held that the Colville Tribe, by submitting itself to the criminal and civil jurisdiction of the State of Washington as authorized by Public Law 280[2] and RCWA 37.12.021, subjected the Tribe and its members to state sales taxes and business regulations. J.S. App. A, p. 11.

1. Without the acquisition of criminal and civil jurisdiction under Public Law 280, it would be clear that the State could neither regulate nor tax sales by the appellant to Indians. The federal government has "exercised through statutes and treaties a sweeping and dominant control over persons who wished to trade with Indians and Indian tribes * * *," a control which precludes state regulation or taxation. *Warren Trading Post* v. *Tax Commission*, 380 U.S. 685, 686-691. See also 25 U.S.C. 261-264;

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[1] RCWA 19.91.120; RCWA 82.32.030; RCWA 82.24.050.

[2] Act of August 15, 1953, 67 Stat. 588, 18 U.S.C. 1162 and 28 U.S.C. 1360. The Act is set forth at J.S. App. E, pp. 2-5.

25 C.F.R. 251.1-251.26.[3] The State's authority to tax or regulate appellant's trade with non-Indians would also be highly doubtful. Such regulation and taxation would not be prohibited because of federal preemption of the regulation of trade with Indians, but they would be of questionable validity because of several overlapping considerations: lack of state jurisdiction over Indian reservations (*Williams* v. *Lee*, 358 U.S. 217, 219-220; see also *Metlakatla Indians* v. *Egan*, 369 U.S. 45); interference with Indian self-government (*Warren Trading Post*, *supra*, 380 U.S. at 686-687)[4] and lack of state fiscal responsibility for Indian welfare (*id.* at 691-692).[5] See generally our memoranda in *Mescalero Apache Tribe* v. *Jones*,

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[3] Because appellant is a full-blooded Indian, he cannot be required to have a license to trade with Indians, 25 U.S.C. 264. In recent years, the Commissioner of Indian Affairs, exercising his discretion, has not required anyone in the State of Washington to obtain a license to trade with Indians and has not subjected persons who trade with Indians in that State, to the regulations found in 25 C.F.R. 251. The statutory exemption from licensing for full-blooded Indians, and the exercise of the Commissioner's discretion for the State of Washington are, in our view, part of the congressional regulatory scheme controlling trade with Indians which this Court found preemptive of state jurisdiction in *Warren Trading Post*, *supra*.

[4] However, in *Warren Trading Post*, where the trader was a corporation rather than an Indian as here, the Court's holding was limited to exemption from state taxation "with respect to sales made to reservation Indians on the reservation * * *" (380 U.S. at 691-692).

[5] Another factor to be considered in appropriate circumstances is the trust status of the land that produced the income (see *Squire* v. *Capoeman*, 351 U.S. 1).

No. 71-738, certiorari granted April 24, 1972, and in *McClanahan* v. *Arizona State Tax Commission*, No. 71-834, certiorari granted May 15, 1972.

Whether Congress, in enacting Public Law 280, tacitly repealed the long-standing federal statutes and regulations governing trade with Indians insofar as they concern Indian lands over which a State assumes civil and criminal jurisdiction, is a question this Court has not yet decided. Similarly, the queston whether or to what extent the assumption of civil and criminal jurisdiction under Public Law 280 constitutes a grant to the State of taxing authority within Indian lands has not been settled and warrants the attention of the Court. These questions are recurrent. The answers are not clear. And a Tribe in choosing whether to permit a State to assume civil and criminal jurisdiction, or a State in deciding whether to retrocede jurisdiction pursuant to 25 U.S.C. 1323, should not be required to act in the dark as to tax consequences.[6]

2. Public Law 280 is entitled "An Act to confer jurisdiction * * * [on certain States] with respect

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[6] At the time the State of Washington assumed civil and criminal jurisdiction within the Colville Reservation, no consent of the Tribe was required by federal legislation. However, state law (RCWA 37.12.021) did require tribal consent for a full assumption of jurisdiction within the confines of a reservation. Such consent was obtained in this case. J.S. App. A, pp. 4-5.

Federal law now requires consent of the tribe, obtained through a special election of its enrolled members, before a State may assume civil and criminal jurisdiction. Act of April 11, 1968 82 Stat. 78, 25 U.S.C. 1321, *et seq. Kennerly* v. *District Court of Montana*, 400 U.S. 423.

to criminal offenses and civil causes of action committed or arising on Indian reservations within such States * * *." The House Report on H.R. 1063, which became P.L. 280, speaks of the bill as part of a series of measures with two co-ordinate aims: withdrawing federal responsibility for Indians where practicable and terminating the subjugation of Indians to federal laws applicable to Indians as such. H. Rep. No. 848, 83d Cong., 1st Sess., p. 3; S. Rep. No. 699, 83d Cong., 1st Sess., p. 3.[7] Some of the measures proposed to achieve these aims were the complete termination of federal responsibility over certain Indian tribes, including distribution of tribal funds and disposition of trust property; the termination of federal services for Indians; and provision for the issuance of certificates of competency to Indians allowing them to withdraw from tribes and receive a share of tribal property. H. Rep., *supra*, pp. 3-5; S. Rep., *supra*, pp. 2-3. However, H.R. 1063 itself was not termination legislation and was presented as a more modest solution to a specific problem. The problem addressed by H.R. 1063, according to the committee report, was the inadequacy of law enforcement and of the adjudication of civil conflicts in some Indian lands:

> As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many States, tribes are not adequately organized to perform that function; con-

[7] The House Report was adopted by the Senate Committee as its report as well.

sequently, there has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.

Similarly, the Indians of several States have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian country within their borders. Permitting the State courts to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective States insofar as those laws are of general application to private persons or private property, is deemed desirable.

After consideration of the proposed legislation, the committee concluded that: any legislation in this area should be on a general basis, making provision for all affected States to come within its terms; that the attitude of the various States and the Indian groups within those States on the jurisdiction transfer question should be heavily weighed before effecting transfer; and that any recommended legislation should retain application of Indian tribal customs and ordinances to civil transactions among the Indians, insofar as these customs or ordinances are not inconsistent with applicable State laws. [H. Rep., p. 6; S. Rep., p. 5.]

That the bill was considered by those who dealt with it to be a law and order measure and not a general termination of federal responsibility is apparent. The law amends Titles 18 and 28 of the Code, and not Title 25 in which the general provisions for federal protection of Indians and statutes ter-

minating such protection are found. The law contains broad provisos, apparently intended to make clear that the grant of state jurisdiction would not affect the trust status of Indian property or authorize the taxation of such property or the regulation of it contrary to federal treaty, agreement or statute. P.L. 280, §§ 2(b) and 4(b), 18 U.S.C. 1162(b), 28 U.S.C. 1360(b). Moreover, there is no indication in the committee reports or debates that a conferral of civil and criminal jurisdiction under Public Law 280 would extend the power of the State to tax Indians, although if this were intended it would have been a matter of sufficient importance to be set before Congress. Similarly, there is no special reference in the legislative history of the Act or the Act itself to a partial repeal of the longstanding federal regulation of trading with Indians.[8]

Moreover, when a State assumes jurisdiction under Public Law 280, most Indian disabilities, including those relating to the trust status of the land and requiring federal consent for leases, mortgages and the like, remain. P.L. 280, §§ 2(b) and 4(b), 18 U.S.C. 1162(b), 28 U.S.C. 1360(b). The tribal structure and government remain; the reservation is not abolished; and the Indians remain the beneficiaries of all federal programs for Indian development that would otherwise be available except those concerning crime prevention and law enforcement. Considerable

[8] Although not used in the State of Washington, these regulations are in use elsewhere and serve to protect the Indians against unscrupulous merchants.

sums are still expended by the federal government on such programs for tribes which have become subject to state civil and criminal jurisdiction.[6]

3. Nevertheless, from a literal reading of Public Law 280 it can be argued that since the "civil jurisdiction" conferred on the State encompasses not only access to state judicial machinery but also state substantive law (subject to listed exceptions), it also includes state regulation and taxation of commerce, so long as the State does not tax real or personal property in trust or regulate the use of such property in a manner inconsistent with any federal treaty, agreement, statute or regulation (P.L. 280 § 4(b), 28 U.S.C. 1360(b)). It can further be argued that the trust status of appellant's land does not in itself prevent taxation and regulation of his commercial activities conducted on it. But see *Squire* v. *Capoeman*, *supra*. It can also be argued that once a State has assumed judicial authority within Indian lands and has concomitantly assumed an increased fiscal responsibility, some of the basic reasons for the inapplicability of state taxation within those lands have been removed. However, the effect of state regulation and taxation on Indian self-government and the considerable Indian disability and federal responsibility

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[6] The Bureau of Indian Affairs, for example, reports expenditures of $14,072,394 for fiscal year 1971 in California, although Public Law 280 subjected all Indian lands within that State to state civil and criminal jurisdiction. The only major category of assistance omitted is "maintaining law and order".

which remain after a State assumes jurisdiction under Public Law 280 should also be taken into account.

For the foregoing reasons, it is respectfully submitted that probable jurisdiction should be noted.

ERWIN N. GRISWOLD,
Solicitor General.

KENT FRIZZELL,
Assistant Attorney General.

HARRY R. SACHSE,
Assistant to the Solicitor General.

EDMUND B. CLARK,
JOHN HELM,
Attorneys.

MAY 1972.

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